Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
Digital Broadcast Copy Protection	)	MB Docket No. 02-230
	)	
	)	
	)	

COMMENT IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING ON THE ADOPTION OF A TECHNICAL MODEL SUCH AS THAT PROPOSED BY THE BPDG TO PROTECT DIGITAL CONTENT SUBMITTED BY THE LAW OFFICE OF ADAM HILL

December 6, 2002

I. Introduction

The primary purpose of the U.S. copyright regime is to "promote the Progress of Science and the Useful Arts."[1] The instrumentalist nature of this clause is to enhance the public interest – the collective right, not collective curiosity – and only secondarily to reward authors.[2] While content should be protected, "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[3] The increase in marginal cost of production through delay, testing and development requirements that would be imposed by the BPDG RDC standard[4] could also constitute a perversion of balance established by the constitution, respected by the legislature, and acknowledged by the Supreme Court.

[1] Art. I, Sec. 8, cl. 8.
[2] Wheaton v. Peters, 33 U.S. 591, 661 (8 Pet. 1834).
[3] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
[4] Broadcast Protection Discussion Group, *Final Report of the Co-Chairs of the Broadcast Protection Discussion Subgroup of the Copy Protection Technical Working Group*, June 2, 2002 (hereinafter "BPDG

II. Background

The Federal Communications Commission (FCC) has deemed that there should be a transition to digital transmission over the broadcast spectrum. Since 1996 an industry group referred to as the Copy Protection Technical Working Group (CPTWG) has been discussing various issues of copy protection. In November of 2001 the CPTWG formed the Broadcast Protection Discussion Group (BPDG) to specifically address digital broadcast copy protection. Recently the BPDG announced it had reached a consensus on the use of a Redistribution Control Descriptor (RCD) to mark digital broadcast programming. The FCC has now sought comment on several issues pertaining to the potential mandating of a particular RCD and ancillary issues concerning digital copyrights management.

III. Summary

a. Direct Responses

1. No, the broadcast flag is not the appropriate technological model to be used. The methodology used by the BPDG to reach the standard did not employ an accurate model of consensus, and would serve to install a particularly dominant market incumbent into the position of "gatekeeper" for approving standards and technologies and unduly restrict the availability of products and services to consumers.[5]

Final Report"). Technologies would require approval by creators of technologies listed on "Table A" by the administrators of the RDC administrators. These will hereafter be referred to as "Table A Authorities."

[5] See note 4, *infra*. New technologies and hardware would require interface approval by Table A authorities.

2. No, a government mandate requiring broadcasters and content providers to embed the broadcast flag (or other content control mark) within digital broadcast programming is not necessary. Proprietary protection mechanisms are a less restrictive alternative and will make it much harder for crackers to gain access to protected material, as well as spur further development of content protecting technologies.
3. No, the FCC should not mandate that consumer electronics devices recognize and give effect to the broadcast flag (or other content control mark). Such government regulation would have the effect of institutionalizing the market incumbency of one standard and ordaining particular industry participants with a monopolistic power that would chill innovation, reduce competition and hedge consumer benefits.
4. A consumer electronics device is a neutral, transitory device in the transmission of digital content that may or may not be protected by copyright law. Mandating that all consumer electronics devices assume the cost burden of ensuring the protection of a particular third party's content would be an inappropriate imposition.
5. No, the currently proposed digital broadcast protection system would not be effective in protecting digital broadcast content from improper distribution. The standard does not appear to be a technical protection measure, but merely a flag that labels content as being owned. Its effectiveness would only come through enforcement. Given this structure, there are less restrictive alternatives to enforcement of content protection

than the current proposal by virtue of the fact that copyright law already protects the content.

IV. Statement of Interest

a. The Law Office of Adam Hill (LoAH) provides legal services to members of the technology, telecommunications and entertainment industry. These parties have an interest in digital copy protections by virtue of their creation of content, transmission and storage of digital content. They engage in software design, providing Internet transmission and storage services, and the marketing of their likeness in various forms of media such as computer diskettes, video tapes and web pages.

V. Arguments

a. Adopting the BPDG's RCD would result in an officially sanctioned Copyright Misuse.

Copyright Misuse "forbids the use of copyright to secure an exclusive right or limited monopoly not granted by the copyright office."[6] The fact that only certain content industry participants whose technologies are listed on Table A could determine what technology would be robust enough to protect their content would effectively install these participants as "gatekeepers" over what future products and protection technologies would see the marketplace.[7] Subjecting new hardware and software technologies that render digital content to approval by the Table A Authorities would give them a de facto monopoly over future technology on the basis of protecting *their* content, clearly a patent

[6] DSC. Communications Corporation v. DGI Technologies, 81 F.3d 597 (5th Cir. 1996).

like protection not granted by, or even contemplated as being within the authority of, the Copyright Office or the Copyright Act as written by Congress.

b. **The BPDG RCD would also dramatically increase the barriers to entry into the marketplace for technology companies by virtue of subjecting their research and development processes to the editorial discretion of a non-consensus based mechanism with a stronger interest in maintaining its status as a gatekeeper and dominant market entity than in protecting consumer interests.**

A consequence of this would be the increase in cost of products by virtue of a delay from the review process, cost of additional testing and development, and fewer market choices due to the increased costs of product development.[8]

c. **Mandating a standard would preempt a fair use analysis by giving Table A Authorities the ability to determine what is robust enough to protect their content, and precludes whether or not a particular use of content would be fair.**

The RCD administration mechanism also flies squarely in the face of law established in some jurisdictions that "the commercial nature of a use [a prong in the fair use analysis employed by courts] is a matter of degree [and should thus be weighed on a case-by-case basis], not an absolute . . . ."[9] A fair use analysis involves four prongs and should be made on a case-by-case basis to determine whether or not a particular use of copyrighted content is fair or infringement. The BPDG does not completely explore the issue of how fair use limitations on copyrights would be accommodated. Therefore, adoption of the final report, and mandating the BPDG's RCD would be premature.[10]

d. **The BPDG standard will reduce creative expression.**

---

[7] The BPDG Final Report, Tab N, outlines the proposed structure for approval of future copy protection technologies.
[8] This was acknowledged, if only briefly, in the BPDG final report, para. 2.12.4
[9] Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2d Cir. 1986).
[10] BPDG pg. 12, Sec. 4, n. 12.

Open source (programs whose code is freely distributed) programs that are modifiable by end-users would not qualify for approval by the Table A Authorities because they would not qualify as being tamper-resistant. This would dramatically reduce the alternatives available to consumers to create their own applications, limit their choice of available programs and restrict their financial freedom since the primary benefit of open source programs are that they are free.

e. **Regardless of the stated intent of the standard proposed by the BPDG, the effect would be to maintain the dominance of certain market incumbents.**

The true intent of the RCD model that would be implemented by BPDG Final Report would be to continue the nefarious trend of inhibiting technological development benefiting consumers in order to protect a particular market incumbent's current content distribution mechanism. This battle has been repeated over and over again, most recently and notably as a Recording Industry Association of America campaign has effectively banned peer-to-peer file transfer technology in its infancy by demonizing, stigmatizing and disenfranchising it as only being associated with copyright infringement.[11]

f. **Forcing compliance by the technology industry would lead to the inappropriate disclosure of proprietary trade secrets to potential competitors.**

A trade secret, as defined by most states in the Uniform Trade Secret Act, is any information that gives value to a product or service that is kept secret by its owner.[12] Market participants wishing to produce products that render digital content would be

[11] A detailed chronology of the RIAA's campaign against Peer-to-Peer file transfer technology, and against one specific company, Napster, can be found in their press statements on their own website at http://www.riaa.org/News_Archive.cfm; *See also* A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004 (9th Cir. 2001)(holding Napster responsible for copyright infringement from its employment of Peer-to-Peer file transfer technology); RIAA v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999)(detailing another direct attempt by the RIAA to limit availability of consumer products under the guise of protecting their copyrights).

forced to reveal the technical details and specifications of their products in order to receive compliance approval from Table A Authorities under the RCD administration mechanism. Under the mandate, for instance, manufacturers of video cards for computers would be forced to reveal trade secrets (source code for the software that operates the card) and subject their costly research and development process to approval by the Table A authorities. Does the FCC really wish to give a market incumbent this type of monopolistic power over the market? Does the FCC really wish to give this type of monopolistic power over the technology industry? What about telecommunications companies that provide cell phone transmission of digital content? The same situation would exist for manufacturers of digital camcorders, digital cameras, computer video cards, software with proprietary internal digital content applications (such as video games or desktop publishing tools), and streaming media applications. By subjecting market participants to the approval of a potential competitor the mandating of this standard will achieve a result far broader than that of merely protecting content from *potential* infringement.

g. **Definitions put forth by the BPDG are ambiguous and require further elaboration and impact analysis**.[13]

The ambiguous definitions of "robustness," "compliance" and even "tamper-resistant" would lead to inappropriate editorial discretion in their application by Table A Authorities. The fact that there was significant dissent on what robustness and compliance standards should be with regards to the administration of the RCD or commensurate technologies, would create a conflict of interest as a gatekeeper would be

[12] Uniform Trade Secrets Act, Sec. I.4., available at: http://www.law.upenn.edu/bll/ulc/ulc_frame.htm .

deciding whether or not the technologies proposed by potential competitors was sufficient to protect their content. Unlike the Audio Home Recording Act, a compromise over one type of digital content (audio recording), this would cover an overbroad array of digital content, often unrelated to the industry which would be administering the standard.

In a further example, would the definition of "tamper resistant" for electronics hardware mean to restrict consumers or other market participants from decompiling programs in an effort to create a subsequently interoperable software program? This activity is viewed as fair use in some jurisdictions (namely the 9th circuit).[14] Would tamper-resistant restrict consumers or market participants from reverse-engineering in order to extract the non-copyrightable functional aspects of a software program? This activity is viewed as fair use as well.[15] Because it is often necessary to reverse-engineer a program to gain access to the unprotected ideas and functional concepts contained in the object code of software,[16] a definition of tamper-resistant that included a restriction on reverse engineering would carve out a particularly large portion of the public commons and put it outside the boundaries of what is accessible by the rest of the market. This would render a de facto monopoly over the functional aspects of a work by copyright owners of software.[17] Such a monopoly should be acquired through a patent, not through a regulatory gate-keeping mechanism structured to protect the narrow interests of one particularly dominant content-providing market incumbent. The implications of this are

---

[13] See BDPG, Sec. 5., para. 5.2 (acknowledging that the proposed standards for robustness were not reached through a consensus, and detailed how an alternate interpretation of the standard would lead to dramatically different results in what could constitute "Robustness.")
[14] Sega Enterprises Ltd. V. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).
[15] Id.
[16] Atari Games v. Nintendo of America, 975 F.2d 832 (Fed. Cir. 1992).
[17] Id. at 1543. This would also contravene the plain meaning of 17 U.S.C. Sec. 102(b).

two-fold: Mandating the BPDG RCD would be vulnerable to court abrogation, and the practical effect that mandating such a standard would have on copyrights would exceed the FCC's mandate since it cannot define what or how copyrights can be protected.

h. **Imposing the broadcast flag could also circumvent the compromise negotiated in the Digital Millennium Copyright Act between Internet Service Providers and the content industry.[18]**

Once the mandate is imposed, content providers will likely try to claim that the flag constitutes an "automatic notice" that content was protected and thus seek contributory or vicarious liability from ISPs for what is currently considered transitory storage or mere conduit transmission of content.[19] Since the Digital Millennium Copyright Act (DMCA) already provides for the protection from the circumvention of Technical Protection Measures, and for the removal of copyright management information, the RCD is not necessary.[20] The flag at this point appears to be nothing more than Copyright Management Information, and thus is attempting to use the RCD administration mechanism as a surrogate means of the unresolved digital rights enforcement issue by controlling which technologies are allowed to reach the marketplace.

i. **The perceived threat does not yet exist in any significant amount, and thus the issues motivating the BPDG are not yet ripe for action.**

The threat of unauthorized distribution has not reached such a scale that the content industry's ability to capture a significant reward has been threatened, the benefit of seeking a one hundred percent compliance for the content control of one or a few industry participants would outweigh the cost to the public commons. Why stifle

[18] Pub. L. No. 105-304, 1122 Stat. 2860 (Oct. 28, 1998).
[19] 17 U.S.C. Sec. 512.
[20] 17 U.S.C. Sec. 1201.

technology and jeopardize innovation – a currently existing threat - prior to the existence of a perceived threat? The issue is not ripe for review, much less action.

j. **Too many issues remain to be explored.**

Such issues include but are not limited to: Tethering;[21] Sec. 110 exemptions for audiovisual content;[22] cost impact analysis on remotely related industries; compatibility with international law and U.S. treaty obligations.

IV. Conclusion

It does not take a government regulator to figure out that the content owners administering the RCD standard would follow up passage of a mandate with a broad range of lawsuits to 1) create legal precedent protecting their proprietary protection mechanism; 2) further diminish the fair use rights of consumers and stifle other technologies such as peer-to-peer file transferring by associating them with the soon to be created *mallum prohibitum* activity of transmitting digital content without compliance with the RCD standard; 3) manipulate the legal system by virtue of litigating into existence protective doctrines and squelching nascent consumer protection movements with an interest in new technological innovation; 4) hold ISPs liable by virtue of claiming the flag constituted notice and thus that they knowingly transmitted material that was

[21] "Tethering" Digital Content to a particular device will further erode the consumer's ability to make use of content. "A plausible argument can be made that section 1201 may have a negative effect on the operation of the first sale doctrine in the context of works tethered to a particular device. In the case of tethered works, even if the work is on removable media, the content cannot be accessed on any device other than the one on which it was originally made. This process effectively prevents disposition of the work. Should this practice become widespread, it could have serious consequences for the operation of the first sale doctrine . . ." U.S. Copyright Office, *Sec. 104 DMCA Report*, Sec. III.A.

[22] What would be the impact of imposing the BPDG's RCD on the exemptions outlined in 17 U.S.C. Sec. 110?

infringing. Table A Authorities will achieve indirectly what could not be achieved directly by imposing costs and enforcement mechanisms on industries only tangentially related to their own.

What is of greater consumer importance, allowing progression and change to increase competition or protecting the interests of dominant market incumbents so that they will "produce digital content?" The Motion Picture Association of America (MPAA) and other predominant content creators will produce digital content when their market incumbency is threatened by competition. Producing content is their livelihood, so threatening to not produce content unless it is flagged is market blackmail analogous to the creation of a legal fiction. Consumers are sophisticated enough to realize that they do not own the content broadcast over the spectrum, and would not have the right to publicly perform any content that is recorded for time-shifting or fair use purposes. This belies the real agenda of the BPDG's RCD administration mechanism. Who will benefit if the MPAA members decide not to allow their movies flow over digital TV with other content? Smaller content-producing market participants from across the world that do not currently use the MPAA to help them distribute their movies and content? This will lead to a flood of content that would otherwise have been crowded out by the BPDG by virtue of the flag mandate.

For the above stated reasons and arguments this law firm asserts that it would be premature for the FCC to mandate the RCD created by the BPDG and detailed in the BPDG Final Report.

Respectfully Submitted by:

_____/s/ Adam Hill_(DC Bar. 477978)

The Law Office of Adam Hill
1717 K. St., NW, Ste. 600
Washington, DC 20036
(202)973-0176
(703)655-8472